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No. 07-788

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In The

Supreme Court of the United States

BERNARD N. SHAW and B. JEAN SHAW, COLUMBIA BASIN APARTMENT ASSOCIATION, ROBERT LEE GAINES and BILLIE JEAN GAINES, MANUEL VALA, and MARIA GALEANA,

Petitioners,

v.

CITY OF PASCO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Washington

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAURA DEBACKER MCALOON
KIRKPATRICK & LOCKHART PRESTON GATES ELLIS LLP
618 West Riverside Avenue
Suite 300
Spokane, WA 99201-0602
(509) 624-2100

LELAND B. KERR
Counsel of Record
KERR LAW GROUP PS
7025 West Grandridge Boulevard
Suite A
Kennewick, WA 99336-7724
(509) 735-1542

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Washington Supreme Court has applied its analytical framework of the rights afforded Petitioners under Article 1, Section 7 of the Washington Constitution, which bestows greater protections upon Petitioners against governmental searches than the rights bestowed by the Fourth Amendment of the United States Constitution.

2. Whether Petitioners have presented compelling reasons to grant the Petition where the Petitioners failed to demonstrate the existence of a federal right that triggers the due process requirements of notice and hearing, and where the instant proceeding actually originated in a state court action filed by Respondent for the purpose of enforcing the ordinance at issue and seeking to enjoin landlord Petitioners from operating a business in violation of the Ordinance.

3. Whether Petitioners have presented compelling reasons to grant the Petition where the rigorous constitutional analysis applied by every court below does not conflict with a decision of this Court on an important federal question, and where Petitioners do not claim that the Washington Supreme Court's ruling implicates an important federal question that has not been settled by this Court.

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INTRODUCTION

The Ordinance at issue here was adopted by the City of Pasco in response to a serious and growing problem with substandard and dangerous rental housing, often rented to tenants of limited means who lacked the knowledge or ability to hold the landlord responsible for the condition of the units. The extensive record detailing the legislative history of the Ordinance was provided to the court below which vividly summarized the state of affairs in Pasco, Washington as follows:

> In the 1990s, the city of Pasco faced problems with a number of substandard rental housing units. For example the landlords involved in this case owned rental units for which there was no working source of heat. Tenants were told they had to provide their own heat via portable electric space heaters. In addition, kitchens contained no vent, hood, fan, or window, despite the fact that natural gas was used to heat them. In one building, windows were not properly installed, allowing weather to enter the wall. Plumbing was in such disrepair that a bucket had to be used to catch water draining from a bathroom sink. One unit was infested with cockroaches. Some units had unsound wall finishes and warped or buckled walls.
>
> One of the Shaws' tenants complained that they were refusing to make necessary repairs to her apartment. For some time,

> neither the heat nor the air conditioning worked. The doors did not open unless she resorted to using a knife or plastic card. Both the bathroom and kitchen sinks drained into buckets. The shower wall was collapsing and the kitchen and bathroom floors were rotting. When the tenant demanded either repairs, placement into a better rental unit, or refund of her deposit so she could move out, the apartment manager told her that if she continued to complain, he would have her deported.

Pasco v. Shaw, 161 Wash. 2d 450, 166 P.3d 1157, 1159 (2007). In response to the obvious rental housing crisis faced by the citizens of Pasco, the City Council investigated every potential method of regulating the habitability of rental units. Because Washington law does not provide a method for the issuance of administrative search warrants, a housing inspection program such as those utilized in other states was not available. However, the City has broad police authority to regulate businesses that operate within its boundaries and the Council recognized that landlords are indeed commercial businesses. Accordingly, the City Council adopted Ordinance 3231 as a method of regulating all commercial operations that were offering dwelling units to the public for rent. The vast majority of landlords readily complied with the law. However, Petitioners Shaw, whose properties provided proof of some of the worst living conditions for tenants in the City, resisted the requirement that they provide a certification to the City that their

units were in compliance with the Uniform Housing Code and did not present a danger to their tenants. The City's action for injunctive relief followed the Shaws' refusal to submit such a certification, the expiration of their business license due to the lack of such certification, and their continued operation of their rental business in blatant violation of the licensing ordinance.

The Petitioners have challenged the constitutionality of this licensing program on its face and assert that it is overly vague and violates the Fourth and Fourteenth Amendment rights of landlords and tenants alike. Contrary to this assertion, the Ordinance provides clear and concise direction to rental businesses as to the conditions for issuance of a City business license, establishes a standardized process for obtaining the requisite certification of habitability from a qualified private inspector, and imposes no duties or obligations on any tenant whatsoever. Unfortunately, the Petitioners have now resorted to blatant misrepresentation of the facts and the City's conduct in support of this last appeal in the desperate hope that this Court will come to a conclusion different from the three state courts and a federal court below, each court finding that the Ordinance is a valid exercise of the City's licensing authority that does not violate the constitutional rights of any person.

The Petitioners have presented no compelling reasons for this Court to grant the Petition and have failed to meet their burden in demonstrating such

reasons. Accordingly, this Court should deny the Petition.

STATEMENT OF THE CASE

I. Factual Background

Ordinance 3231 is a business licensing regulation enacted by the Respondent City for the purposes of protecting the public health, safety and welfare of the citizens, especially tenants who reside in dangerous substandard housing. Pet. App. 124. The Ordinance was adopted following a series of investigations, public hearings, public meetings and consideration of significant volumes of testimony and evidence. R. 346; Pet. App. 124. The Ordinance imposes the following regulatory requirements on landlords:

> . . . License Required. No person shall make available for rent, or rent, lease, or let, to the public any residential dwelling unit . . . without securing and maintaining a current business license as required by this title.
>
> . . . Inspection Required. (a) As a condition for the issuance of a license provided by this chapter, the applicant shall provide a certificate of inspection that all of the applicant's rental dwelling units comply with the standards of the Uniform Housing Code and do not present conditions that endanger or impair the health or safety of a tenant including:

1) structural members that are insufficient in size or strength to carry imposed loads with safety;

2) exposure of occupants to the weather;

3) plumbing and sanitation defects that directly expose the occupants to the risk of illness or injury;

4) lack of water, including hot water;

5) heating or ventilation systems that are not functional or are hazardous;

6) defective, hazardous, or missing electrical wiring or electrical service;

7) defective or inadequate exits that increase the risk of injury to occupants;

8) violations that increase the risks of fire; or

9) violations of other applicable codes, rules or regulations.

Pet. App. 126-27.

The Ordinance also establishes a license fee, a renewal period and provides a list of qualified persons whom a landlord may retain to complete the required certificate of inspection when the business license is renewed every two years. Pet. App. 127-28. The certificate of inspection may be completed by any of the following persons using a City approved form:

1) a City of Pasco Code Enforcement Officer;

2) inspectors certified by the United States Department of Housing and Urban Development for grant-required inspections;

3) certified private inspectors approved by the City upon evidence of completion of formal training including the passing of an examination administered by the National Association of Housing and Redevelopment Officials, the American Association of Code Enforcement or other comparable professional association as approved by the director of community development which approval or denial shall be subject to appeal to the Code Enforcement Board;

4) a Washington licensed structural engineer;

5) a Washington licensed architect.

All inspection certifications shall be submitted on forms provided by the City or approved by the United States Department of Housing and Urban Development.

Pet. App. 128-29.

The Ordinance merely imposes business licensing requirements on any person who wants to rent dwelling units to the public. Contrary to the assertions made by Petitioners, the business licensing forms are not used for the purpose of citing the landlord or the tenant for building code violations. Nowhere in the Ordinance is there any provision for the issuance of a Notice of Violation simply because a property fails a licensing inspection. The enforcement

provisions cited by the Petitioners as "evidence" of government action relate only to the failure of an individual to properly obtain a business license or for providing false information in a business license application. Pet. App. 129-30.

No City employee is ever involved in the landlord's licensing certification process unless the landlord asks the City Code Enforcement Officer (one of five different inspector options available) to perform the inspection for the landlord's benefit. If any inspector retained by a landlord is unable to certify that the dwelling unit complies with the standards set forth in the Ordinance, then the landlord merely corrects the deficiency, has the property re-inspected, and obtains a certificate of inspection. This is true regardless of whom the landlord has chosen to perform the inspection. Indeed, when a landlord hires someone other than the Code Enforcement Officer to complete a certificate of inspection, no City employee will ever learn of a failed inspection unless the landlord notifies the City that a dwelling unit failed to pass the certification inspection.

Nothing in the Ordinance places any obligations upon a tenant. It does not require any action on the part of a tenant, does not require any interaction between a City official and a tenant unless the landlord facilitates the interaction, and does not impose any risk of penalty upon a tenant.

II. Correction of Factual Misstatements by Petitioners

At page 3 of the Petition, the following statement is made: "To initiate the enforcement process, the City notifies the property owners of the scheduled inspections, but gives no notice to the tenants. App. 124-31." This is inaccurate as demonstrated by a review of the cited pages in the Petitioners' Appendix.

The correct characterization of the Ordinance sections referenced by Petitioners is as follows: The City notifies the holder of a rental business license of the renewal period during which a landlord must obtain a renewal inspection and renew the business license. Renewal periods are assigned to all residential rental businesses at the time of an initial business license application on a rotational, quarterly basis. The actual inspection of the dwelling unit(s) in conjunction with an application for a new or renewal license must be conducted not more than ninety days prior to the date on the certificate of inspection. Pet. App. 127-28. The City has no role in the scheduling of the inspection of a dwelling unit, unless the landlord has requested the services of the City Code Enforcement Officer to complete the landlord's certificate of inspection. If a landlord chooses to retain a City employee to complete the certificate, then there will obviously be coordination between the landlord and the City employee to schedule the inspection at a mutually convenient time. However, the landlord is solely responsible for scheduling the visit to a

tenant's unit, assuming the unit is occupied during the entire ninety day window of opportunity.

The following statement at page 3 of the Petition is also inaccurate: "The inspections are conducted by a City-employed or City-approved inspector. App. 128-29." A correct statement of the Ordinance terms is that the City provides at least five options for a landlord to choose from in hiring an inspector to prepare the certificate of inspection, one of which includes the City Code Enforcement Officer. Other options include engineers or architects licensed by the State of Washington, inspectors approved by the United States Department of Housing and Urban Development, or other inspectors with credentials from professional associations. If a professional association is not listed, the landlord may seek approval from the City's Director of Community Development and the approval or denial of that request is subject to appeal to the City's Code Enforcement Board. Pet. App. 128-29.

At page 4 of the Petition, the Petitioners assert "factual" statements regarding the lack of provision of notice or hearing by the City to the tenants. Again, this inaccurately implies that the City has a role in the relationship between the landlord and the tenant or a required role in the actual scheduling or performance of the inspection. It further implies that the Ordinance governs or controls the actions or property of a tenant. It does not, as set forth in detail in the arguments presented below.

Finally, page 4 of the Petition contains the statement that the Ordinance denies a landlord who is in violation of the licensing requirements a hearing before enforcement or penalties attach. This is simply not true and misleads this Court. The Ordinance itself merely describes the penalty for violation and does not contain the procedure for enforcement of its terms because it is only one portion of an entire Business License Title of the City Code dealing with administrative regulations of the City, which includes a hearing before the City Council prior to revocation of a business license. As demonstrated by this very case, the City must initiate court action to prevent a non-licensed landlord from continuing to operate a rental business without a license and it is a court that ultimately imposes a fine for such violations after a hearing on the merits.

III. Procedural Background

In the instant case, Petitioners Shaw hired a private inspector who declined to certify their rental units as being in compliance with the Uniform Housing Code. RP 379-81; 386-92. The Shaws ultimately asked the City Code Enforcement Officer to inspect their dwelling units and then claimed that certain tenants refused to allow the landlord to enter their units with the City employee. The City made no attempt to enter or inspect those units without the permission of the landlord and the tenant. Pet. App. 153-54. When the Shaws did not provide the required certificate to the City, their business license was not

renewed, but the Shaws continued to operate their rental business without a license. Pet. App. 174-75. The City then initiated this state court action to enjoin the Shaws from operating the rental business without a license and to seek the imposition of civil penalties for violation of the City ordinance requiring a valid business license. Pet. App. 173-78.

The Shaws and the remaining Petitioners filed a concurrent federal action claiming that the ordinance was unconstitutional on its face and violated the Fourth and Fourteenth Amendment rights of landlords and tenants. The United States District Court for the Eastern District of Washington entered summary judgment in favor of the City on all of Petitioners' claims. Pet. App. 93-106. Petitioners then appealed to the Ninth Circuit.

The Ninth Circuit issued two orders in its reported decision. First, the Shaws' claims were dismissed outright under the *Younger* doctrine[1] because a) the City's state court action against the Shaws was pending at the time the federal suit was filed; b) the City has a "strong interest in its land-use ordinance and in maintaining habitable dwellings for its residents"; and c) the Shaws had an opportunity to pursue their federal claims in the state court proceeding. Pet. App. 70-71; *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801 (9th Cir. 2001).

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[1] *Younger v. Harris*, 401 U.S. 37 (1971).

The Ninth Circuit then vacated the District Court's decision on the remaining claims of the tenants and the landlord association on the grounds of the *Pullman* abstention doctrine.[2] The Ninth Circuit determined that application of the *Pullman* doctrine was appropriate because a) the case touched upon a "sensitive area of social policy upon which federal courts ought not to enter unless no alternative to its adjudication is open"; b) "interpretation of the validity of the Pasco Ordinance under the Washington Constitution may eliminate the need to determine whether it also violates the federal Constitution"; and c) the validity of the Ordinance under the State Constitution was uncertain. Pet. App. 73-74; *Columbia Basin Apartment Ass'n v. City of Pasco,* 268 F.3d at 802.

Subsequently, the landlord association and the tenants were allowed to intervene in the City's equitable state action against the Shaws so as to allow the Washington courts to fully adjudicate all state and federal constitutional claims of all parties. Pet. App. 50-53. Every state court that has considered the Petitioners' claims has now upheld the Ordinance as a constitutional exercise of the City's licensing authority, denied the due process claim that the Ordinance is void for vagueness, and refused to find that the licensing requirement of a certificate of inspection turns a landlord's private inspector into a state actor

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[2] *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496 (1941).

thus implicating the Fourth Amendment requirement of a search warrant for a governmental administrative inspection under *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523 (1967). Pet. App. 1-25; 26-37; 47-49. Absent a finding of state action, it was never necessary for any of the lower courts to consider the Petitioners' remaining due process claim that the tenants must be provided with notice and an opportunity to object to a landlord's entry for the licensing inspection.

To the extent that the Petitioners are asserting the failure of the lower courts to consider the landlord's due process rights related to the denial or revocation of a business license, such a claim lacks substance and credulity in light of the procedural history of this very case. The only landlords to whom the penalty provisions of the Ordinance have been applied are the Petitioners Shaw. This action originated directly as a result of the City's attempt to enforce its rental business licensing ordinance in a court of law and it is this very proceeding which has afforded the Shaws all of the procedural and substantive due process they are due. To claim otherwise is ludicrous. *See* Pet. App. 42-46 (Franklin County Superior Court, Summary Judgment Order granting permanent injunction against Bernard and Jean Shaw).

REASONS FOR DENYING THE PETITION

First and foremost, the decision of the Washington Supreme Court below is a decision interpreting the privacy rights afforded to Petitioners under the Washington State Constitution. It is undisputed that Article I, Section 7, of the Washington Constitution provides its citizens rights that are broader than those provided under the Fourth Amendment. *State v. Carter,* 151 Wash. 2d 118, 85 P.3d 887 (2004); *City of Seattle v. McCready,* 123 Wash. 2d 260, 868 P.2d 134 (1994). What the Petitioners seek from this Court is a ruling that the highest court of the State of Washington improperly interpreted the privacy rights afforded citizens of the State under the State Constitution. Absent compelling reasons for this Court to interfere in the interpretation of a State Constitution by a State Supreme Court, the Petition should be denied.

Second, a court must first find the existence of state action before any federal constitutional rights are implicated under the Fourth Amendment or the Fourteenth Amendment. As every lower court has held, no state action exists in the City's licensing program for residential rental businesses.

The decision of the Washington Supreme Court on Petitioners' Fourteenth Amendment claim that Ordinance 3231 was void for vagueness is wholly consistent with the decisions of this Court and the Courts of Appeals. Further, in their facial challenge to the validity of Ordinance 3231, the Petitioners failed to establish the existence of any state action that

triggers a landlord or a tenant's Fourteenth Amendment due process rights of notice and an opportunity to be heard, thus there was never any basis for the courts below to consider such a claim.

Finally, none of the issues now presented by Petitioners implicate an important question of federal law that has not previously been decided by this Court, nor have the Petitioners demonstrated that the Washington Supreme Court decided a federal question in a manner that conflicts with another court. Accordingly, Petitioners have failed to meet their burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. THE WASHINGTON SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S FOURTH AMENDMENT STATE ACTOR ANALYSIS

Throughout nearly a decade of enforcement and the proceedings below, the City has never taken the position that Ordinance 3231 authorizes entry by a governmental officer into a residential rental unit for purposes of issuing code enforcement citations. The Ordinance is merely a business licensing ordinance and does not implicate any person's Fourth Amendment right against an illegal search. The City has never attempted to enter a unit without the permission of the landlord and the tenant. As was the case with the Shaws' tenants, when the tenant objected to

the City's entry, the City employee refused to enter and inspect the premises for the landlord. If a tenant refuses to allow a landlord to enter the premises for his or her business purposes, it is incumbent upon the landlord to obtain entry into the premises using the legal process available under RCW 59.18.150. *See* Pet. App. 121-23.

Based on the plain and simple licensing requirements set forth in the Ordinance itself, every lower court has ruled that the business licensing requirement imposed on landlords by the ordinance does not violate the constitutional rights of any landlord or tenant, either under Article 1, Section 7, of the Washington Constitution or the Fourth Amendment. However, each lower court properly determined that the Petitioners could not establish the predicate requirement of state action that would trigger the substantive and procedural rights afforded by the Fourth and Fourteenth Amendments.

A. Washington State Law Requires A Search Warrant For Governmental Code Enforcement Inspections Of Residential Rental Units And Does Not Permit The Issuance Of Administrative Warrants For Suspected Civil Violations

The Ninth Circuit, in its analysis of the *Younger* and *Pullman* abstention doctrines in the related federal action filed by Petitioners challenging the Respondent's Ordinance, recognized that Article 1, Section 7, of the Washington Constitution affords

"more protection to its citizens than the federal Constitution" and "clearly recognizes an individual's right to privacy with no express limitations[.]" *Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 801, 803-804 (2001). As succinctly summarized by the Ninth Circuit:

> The Washington Supreme Court has determined that "[t]he relevant inquiry under the Washington [C]onstitution in determining whether there has been a search is 'whether the State has unreasonably intruded into a person's "private affairs."'" *State v. Young*, 123 Wash. 2d 173, 867 P.2d 593, 597 (1994) (en banc) (citation omitted). "The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry. Under the Fourth Amendment, a search occurs if the government intrudes upon a subjective and reasonable expectation of privacy. However, under the Washington [C]onstitution, the inquiry focuses on 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* (citations omitted).

Id. at 804, fn.6.

Applying the Fourth Amendment and Article 1, Section 7 principles set forth above, the Washington Supreme Court long ago confirmed that search warrants are required when the government seeks to search residential rental properties for code violations over the objection of a tenant. *City of Seattle v.*

McCready, 123 Wash. 2d 260, 271, 868 P.2d 134 (1994) ("*McCready I*"). In *McCready I*, the City of Seattle had obtained search warrants to inspect residential rental properties for code enforcement purposes, but the landlords challenged the probable cause standard used to obtain those warrants. *Id.* at 266-68. Thus, the initial issue on appeal was whether Article 1, Section 7 permitted Washington courts to apply the lesser administrative standard of probable cause for such a search warrant, as was permitted under the Fourth Amendment pursuant to this Court's decision in *Camara v. Mun. Court of the City & County of San Francisco*, 387 U.S. 523 (1967). However, the Washington Supreme Court never reached the *Camara* question because it determined that the Superior Court issuing the warrants had no lawful authority to do so because the warrants had in fact been issued on less than probable cause (i.e. the *Camara* administrative probable cause standard) and no statute or court rule permitted a superior court to issue such warrants. The Washington Supreme Court held that an inspection of a residential rental unit for code enforcement violations by a government official, and over the objection of the tenant, invades "the tenants' private affairs and . . . no authority of law support[s] warrants to search for housing code violations absent probable cause." *McCready I*, 123 Wash. 2d at 280.

Subsequently, the City of Seattle began obtaining "administrative inspection warrants" based on probable cause that a civil infraction had been committed.

In *McCready II,* the Washington Supreme Court ruled that no state court has the inherent authority to issue search warrants based on probable cause that a civil infraction has occurred, and no statute or court rule existed which authorized such administrative search warrants absent probable cause of a criminal violation. *City of Seattle v. McCready,* 124 Wash. 2d 300, 309, 877 P.2d 686 (1994) ("*McCready II*"). The same conclusion was subsequently reached by the Washington Supreme Court applying only a Fourth Amendment analysis in *Bosteder v. City of Renton,* 155 Wash. 2d 18, 117 P.3d 316 (2005).

The *McCready II* court also addressed the landlords' objection to governmental searches conducted solely based on a tenant's grant of authority to the governmental agent. The landlords argued that only a landlord can authorize entry to a code inspection officer who sought entry to search for code violations. *McCready II,* 124 Wash. 2d at 304. The court held that the tenant's privacy right in the premises gave the tenants the right to authorize a government official the right to search both the rented premises and the common areas for code violations. *Id.* at 305-06.

Thus, the *Camara* Court's reasonableness standard for probable cause for administrative search warrants does not rise to the level of protection required by Article I, Section 7, of the Washington State Constitution. Based on this substantive and qualitative difference between Fourth Amendment jurisprudence and the protections afforded by the

Washington State Constitution, the Ninth Circuit in this case properly recognized that resolution of the state privacy right question would subsume and eliminate any question of whether the Ordinance also violates the Fourth Amendment. Pet. App. 83. The Petitioners apparently concurred in the Ninth Circuit's analysis until they lost their appeals at every stage of the State's review and now contend that the State court's analysis fails to comport with federal decisions on the Fourth Amendment.

The decision below is in no way inconsistent with the decisions of this Court or other federal courts regarding the warrant requirements under the Fourth Amendment. Rather, the court below thoroughly reviewed the broader protections afforded citizens in a landlord-tenant relationship under Article 1, Section 7, of the Washington Constitution as set forth in the *McCready* cases. That analysis subsumes and exceeds the Fourth Amendment protections set forth in *Camara* and *Chapman v. United States*, 365 U.S. 610 (1961), two cases upon which Petitioners heavily rely. However, unlike the Petitioners, the Washington Supreme Court promptly recognized the ultimate issue to be addressed:

> Because the *McCready* cases and *Bosteder* involved searches conducted by city inspectors, these cases do not answer the question presented here, whether the Fourth Amendment or article I, setion 7 is violated where a landlord and a privately engaged inspector

> inspect a rental property for code violations that impact health and safety.

Pasco v. Shaw, Pet. App. 10.

The lower court properly determined that a prerequisite to the analysis of whether a search warrant is required is a finding that a state actor is involved. This is wholly consistent with the decisions of this Court and the Courts of Appeals and the Petitioners have not demonstrated any conflict between this Court's analysis of state action and the analysis applied by the Washington Supreme Court.

B. The Washington Supreme Court Correctly Decided That No State Action Occurs When A Landlord Inspects Or Arranges For Inspection Of A Rental Property For Purposes Of Obtaining A Business License From A City

Petitioners attempt to dodge the central issue of state action by simply not raising it in any of their questions presented and by arguing primarily that a warrant is required because the City requires a landlord to provide it with the certificate of inspection. Every lower court to face this issue has correctly and plainly stated that the protections of the Fourth Amendment and Article 1, Section 7 are not implicated unless there is first a finding of state action. Pet. App. at 10, 12, 30, 31, 48. The fact that the business licensing requirement does not constitute state action has become the repeating and resounding

death knell to the Petitioners' inspection related Fourth or Fourteenth Amendment contentions:

> [U]nder the Pasco ordinance a landlord can engage *private* inspectors in order to further the *private* objective of obtaining a certification needed to maintain a business license. Significantly, if a private inspector finds code violation, the ordinance does not require the inspector to turn his or her findings over to the city. Thus, a landlord can remedy any violations found by an independent inspector, submit to another inspection, and obtain a license based on the new inspection, without the city ever being notified of the original violations. The city insists only upon the certificate that an inspection has been successfully completed. Landlords first and foremost further their *own* ends when they engage in the inspections contemplated by the ordinance. In sum, the petitioners have not met their burden of showing that landlords and their privately engaged inspectors are state actors. Absent state action, neither the Fourth Amendment, nor article I, section 7 [of the State Constitution] was violated.

City of Pasco v. Shaw, Pet. App. 11-12 (emphasis in original).

It is a fundamental tenet of constitutional analysis that a claim for violation of the Fourth Amendment may only proceed if the claimant establishes the search is committed by the government, i.e., a state actor. *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S.

922, 924 (1982); *Camara*, 387 U.S. at 528 (Fourth Amendment rights are enforceable only when the search is conducted "by government officials"). The state actor requirement for Fourteenth Amendment claims is also well established in the jurisprudence of this Court. *Lugar*, 457 U.S. at 924 ("Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'"); *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state action is an implicit predicate for the application of constitutional rights).

This Court has articulated four approaches to the question of whether conduct consists of state action: public function, state compulsion, nexus and joint action. *Lugar,* 457 U.S. at 937 (*e.g.*, the "public function" test, *see Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); the "state compulsion" test, *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); the "nexus" test, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); the "joint action" test, *see Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)). Which test or tests is appropriate will depend on the particular factual circumstances, however the underlying common thread to these tests is "that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Lugar,* 457 U.S. at 937. There "is no specific formula for defining state action," rather it is a "fact-bound inquiry" that turns

upon the circumstances of a particular case. *Id.* at 939; *Howerton v. Gabica,* 708 F.2d 380, 383 (9th Cir. 1983).

The Washington Supreme Court properly based its analysis below on the question of whether the action complained of by Petitioners can be fairly attributable to the state. *See Shaw,* 161 Wash. 2d at 459-62 (fully analyzing the state action question.) The court appropriately made its fact-bound inquiry based "on the circumstances of [the] given case." *Shaw,* 161 Wash. 2d at 460. As court after court has held, there is no state action involved in Ordinance 3231, thus there can be no violation of the Fourth Amendment.

1. Obtaining A Certificate For Purposes Of Operating A Business Is Not A Traditional Or Exclusive Public Function

Under the public function test a private party can be considered a state actor when it engages in a "traditionally exclusive governmental function." *Rendell-Baker v. Kohn,* 457 U.S. at 842; *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157-64 (1978). The only governmental function here is the requirement that a certain form of business obtain a license to operate that business. The governmental function ends there. However, as a condition of issuance, a private business owner must provide certain documentation to the City. For a residential rental business, the City requires presentation of a completed certificate of inspection. It is common practice for cities to require

other types of businesses to present other types of certifications before granting a business license – daycare centers must present certificates from the health department; beauticians must have a cosmetology license; commercial truck drivers must have a commercial driving license endorsement; lawyers, doctors and certified public accountants must pass licensing exams and provide proof of continuing education courses; teachers and school volunteers must pass criminal background checks – the list goes on and on. However, the mere requirement that the City receive a copy of a certification form does not automatically convert the person or entity who provided the landlord with that certification to the applicant into an agent acting on behalf of the City.

The Petitioner's public function argument fails absent evidence of the delegation of the City's code enforcement authority to the private inspectors. No such delegation occurs under this licensing program. Yet, the Petitioners attempt to prove the existence of a traditional governmental function by claiming that a landlord's affirmative act of requesting a City employee's assistance in obtaining the certificate of inspection is "conclusive of state action" because the person chosen by the landlord to perform the inspection is also a full-time employee of the City. Pet. for Cert. at 19.[3] This argument is boot-strapping at its

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[3] Citing *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. at 303; *West v. Atkins*, 487 U.S. 42, 50 (1988).

most egregious – the Petitioners simply cannot fabricate the existence of state action by claiming that the governmental function test has been met because the Petitioners personally invite a city employee to perform a business function for the landlord's own benefit. The Ordinance itself places no obligation on the landlord to use a City employee for the certification process. It is the landlord who exercises sole control over the extent and nature of the City's involvement in his business licensing inspection.

Furthermore, the inspector – whomever the landlord has retained – is not involved in issuing the actual business license. It is the landlord who obtains the certificate of inspection from the inspector, presents the certificate to the City's business license office and is then issued a license upon payment of the fee. If a landlord's hired inspector notifies the landlord that the dwelling unit cannot be certified in its present condition, then it is the landlord who simply fixes the defect and obtains a follow-up inspection. The City is never involved in the landlord's inspection process unless the landlord asks the City employee to be the inspector. If and when a City employee provides this additional service to the landlord, he is not acting within the scope of his traditional duty of code enforcement.

In their briefing on this issue, the Petitioners again misstate the facts in an attempt to shore up a shaky legal argument. The Petitioners claim that "the inspections are scheduled by the City, the extent of the inspection is dictated by the City, ... The City

requires the inspection results be reported back to the City for purposes of determining what action the City will take as the result of the inspection. . . ." Pet. for Cert. at 19-20. This is simply untrue and unsupported by the record, as demonstrated by the complete lack of citation for these "facts." As set forth in the Factual Background, *supra*, the City merely notifies a business license holder of an upcoming renewal period for an existing license. All responsibility for meeting the licensing requirements within the renewal period fall upon the license applicant, including the selection of a qualified inspector, scheduling of the inspection and submitting the properly completed certificate of inspection to the City's business license office. There is absolutely no evidence in this record to support a claim that the City takes "further enforcement action" against any landlord based on the information contained in a certificate of inspection submitted with a business license application. Indeed, it bears repeating that the City will only see a certificate of inspection after the dwelling unit(s) have been certified by the landlord's inspector. There is no evidence in the extensive record below to support a claim that the Code Enforcement Officer took "further enforcement action" or issued any notices of violation or civil infractions to any person as a result of the licensing certification process. The simple truth is that no such evidence exists because no such events occur. It is only the landlord that controls the outcome here.

2. The City Of Pasco Does Not Seize Decision-Making Power As To How To Comply With The Law

Under the compulsion test, the question is whether there is coercive influence or "significant encouragement" of the state that effectively converts a private action into a government action. *Kirtley v. Rainey*, 326 F.3d 1088, 1094 (9th Cir. 2002). Simply fulfilling a statutory duty is generally not considered state action when the private party has decision-making power over how to fulfill that duty. *Id.* Here, it is the landlord that decides all of the factors involved in fulfilling the duty to obtain a certificate of inspection. Therefore, there is not the requisite level of government involvement to find state compulsion. The landlord determines who will be retained to perform the inspection (and even has the opportunity to obtain approval of additionally qualified persons not listed in the Ordinance); the landlord determines when the inspection will be performed (i.e., when the unit is unoccupied or upon arrangement with a tenant); and the landlord ultimately determines whether the condition of the properties make it economically feasible to continue operating her business if substantial repairs are needed to obtain the certification from her chosen inspector.

The Petitioners' claim that coercion exists because the license is a condition of doing business in the City, yet a tenant can refuse to permit the landlord from entering a rented unit for purposes of meeting the business licensing requirement. This

argument goes against Washington's well-established rule that a tenant cannot unreasonably withhold consent for a landlord to enter under RCW 59.18.150 and a tenant has a limited privacy right in rented property because it is subject always to the landlord's right of entry. *Kalmas v. Wagner*, 133 Wash. 2d 210, 219-20, 943 P.2d 1369 (1997). The landlord's business purpose for entering a rented unit is to obtain a licensing certification. This is no different than a situation where a landlord needs entry into a tenant's unit to replace wiring, upgrade appliances or for any other business purpose. A tenant who absolutely does not want to permit a landlord entry (and one must question why that would be the case) always has the option of giving notice to the landlord and the landlord has the ability to terminate the lease of an unreasonable tenant who refuses to allow him entry for business purposes and with the requisite notice.

3. There Is No Close Nexus When Private Landlords Arrange Business License Inspections Through Private Inspectors

The Petitioners fail to demonstrate the existence of a close nexus between the City and the landlords and inspectors. Furthermore, the Petitioners again rely on contrived facts in an attempt to strengthen their characterization of the relationship between the City and the landlord's chosen inspector. Under the nexus test, private action may be considered state action when "there is such a close nexus between the

State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself." *Jackson,* 419 U.S. at 351. However "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State. . . ." *Id.* (holding that even actions of heavily regulated utility companies are not state action when they terminate service to customers); *Moose Lodge 107 v. Irvis,* 407 U.S. 163, 176-77 (1972) (holding that the actions of a highly regulated vendor of alcohol are not necessarily state action without something more).

Here, Petitioners contend that the City's minimal description of the standards for issuance of the certificate of inspection converts private inspectors into state actors. This Court explicitly rejected the notion that regulation alone creates the nexus needed for state action in *Jackson* and *Moose Lodge.* Furthermore, as noted *supra,* the Petitioners blatantly misstate the facts, claiming that the City schedules the inspections and evaluates the inspections for compliance. The City has no such involvement. The City's only involvement is to receive the successfully completed certificate of compliance as a prerequisite to issuing a business license. Under the Ordinance the City is never notified of code violations or failed inspections. The landlord may make the required changes to become compliant and obtain a passing certificate without any City involvement whatsoever. In the event that the landlord has requested the services of the City Code Enforcement Officer in

completing the certificate of inspection, the same process will be followed – the inspections are never used for the purpose of issuing notices of violation or civil infractions, they are merely provided as a service to the landlord and are available only upon request. These facts do not support the nexus required between the city and any inspections.

4. The City Of Pasco Has No Contractual Relationship, Actions In Concert, Or Conspiracy With Landlords And Inspectors

Petitioners fail to show that there is any conspiracy, actions in concert, or contractual relationship as required under the joint action test. Under the joint action test, the question is whether a private party "has engaged in a conspiracy or acts in concert with state agents to deprive one's constitutional rights." *Gonda v. Gray,* 707 F.2d 435, 437 (9th Cir. 1983). This type of state action is typically found when there is an actual contract between the state and the private parties to form a symbiotic relationship. *Burton v. Wilmington Parking Auth.*, 365 U.S. 830 (1961) (state action was found where a small vendor contracted with the government to operate on the premises of a federal building and engaged in discriminatory conduct).

The facts of this case simply do not support a claim of joint action. Rather, private landlords are solely responsible for choosing the means by which a

certificate of inspection is obtained and can do so with no involvement from the City whatsoever. Indeed, the use of a City Code Enforcement Officer is only one of at least five different options for obtaining the certificate. The City has no contractual agreements with the other types of inspectors available to the landlord and there is no requirement that the inspectors have any form of relationship or ties to the City.

The lower court properly held that the business licensing requirement imposed on landlords by the Ordinance does not violate the constitutional rights of any Petitioner landlord, tenant or business association, either under Article 1, Section 7, of the Washington Constitution or the Fourth Amendment because it does not implicate state action. Petitioners fail to demonstrate any compelling reason for this Court to grant their Petition, nor have Petitioners demonstrated any conflict between the holding of the Washington Supreme Court and other federal courts in regards to Fourth Amendment warrant jurisprudence.

II. THE WASHINGTON SUPREME COURT CORRECTLY APPLIED THIS COURT'S VOID FOR VAGUENESS STANDARD AND UPHELD THE ORDINANCE.

The Petitioners contend that the Washington Supreme Court did not follow this Court's precedent when evaluating Ordinance 3231 on a void for vagueness challenge, while proposing a fatally incomplete standard themselves. The lower court expressly

stated that the Petitioners did not meet their "heavy burden of showing vagueness beyond a reasonable doubt." Pet. App. 15. The Washington Supreme Court appropriately applied the standard set forth in 1926 by this Court in *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) and quoted by the Washington Supreme Court in *Haley v. Med. Disciplinary Bd.*, 117 Wash. 2d 720, 739, 818 P.2d 1062 (1991) ("An ordinance is unconstitutionally vague if 'persons of common intelligence must necessarily guess at its meaning and differ as to its application.'") Pet. App. 14. The court applied the appropriate rule of law to the facts presented and recognized that the clear directions in the Ordinance combined with the lack of any confusion as to how to apply the nine standards set forth in the Ordinance demonstrated that it is not unconstitutionally vague. Pet. App. 14-15.

As summarized by this Court in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), a municipal ordinance "is void for vagueness if its prohibitions are not clearly defined." 408 U.S. 104, 108 (1972). Thus, an ordinance will pass the test for vagueness if it gives a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly[;]" avoids "arbitrary and discriminatory enforcement" by providing "explicit standards for those who apply them" without "impermissibly delegat[ing] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09.

Here, the Ordinance first provides a broadly stated standard of conformity with the Uniform Housing Code, a code widely adopted throughout the nation and replete with detailed specifications for construction and maintenance of buildings. The Ordinance then goes on to specify nine examples of code compliance that should be reviewed by an inspector in making his or her certification. The only listed example about which Petitioners complain is the final listed criteria of "violations of other applicable codes, rules or regulations," contending that the language "fails to identify an objective standard against which both owners and tenants might measure their conduct." Pet. for Cert. 26-27. As has been noted above repeatedly, the Ordinance does not regulate tenant conduct in any way, shape or form. That argument fails on its face.

Further, this Court has established that governmental ordinances challenged for vagueness on grounds other than the First Amendment should be examined on an as applied basis only and not as a facial challenge. *Maynard v. Cartwright,* 486 U.S. 356, 361 (1988). Thus, Ordinance 3231 must be evaluated for vagueness in light of the actual conduct of the parties challenging its validity here and not through hypothetical conjecture about what an inspector might do in the course and scope of an inspection obtained by a landlord for purposes of completing his or her business license application. *Id.*

Analyzing the Ordinance as applied to the Shaws demonstrates its validity and clarity of direction. The

Shaws have demonstrated that they know exactly what the ordinance requires of a landlord in order to obtain a residential rental business license from the City of Pasco. The Shaws recognize they must submit certification to the City's licensing office that their residential rental properties comply with the Uniform Housing Code and do not contain conditions that endanger or impair the health or safety of a tenant. The standardized forms required by the City for use by persons conducting a certification inspection provide the requisite uniform and consistent application of the Uniform Housing Code standards, and of any other codes, rules and regulations adopted by the City and applicable to the occupancy of a residential building. The real issue here is that the Shaws can not make this certification, because the rental properties of the Shaws presented some of the worst examples of substandard and unsafe properties, a fact borne out by the record and noted by the Washington Supreme Court in its opinion. Pet. App. 2-3; RP 386-93.

III. THE PETITIONERS' QUESTIONS OF DUE PROCESS FOR TENANTS WERE NEVER RAISED BELOW AND SHOULD BE DISMISSED OUTRIGHT

As a general rule, an appellate court will not hear on appeal issues that were not clearly raised in the proceedings below. *See, e.g., Singleton v. Wulff*, 428 U.S. 106 (1976); *Hormel v. Helvering*, 312 U.S. 552 (1941); *Walters v. City of St. Louis, Mo.*, 347 U.S.

231 (1954). "This rule ensures that 'parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.'" *Boggs v. West,* 188 F.3d 1335, 1337-38 (Fed. Cir. 1999) (citing *Singleton v. Wulff*, 428 U.S. at 120) (quoting *Hormel v. Helvering,* 312 U.S. at 556).

Further, this Court requires Respondent to bring to its attention questions presented that involve issues considered by the appellate court, but never first raised or decided at the district court. Sup. Ct. R. 15.2; *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985) (if objection is not raised, the appellate procedural defect will be deemed waived, and the Supreme Court can accept for review those Questions Presented that arguably were never originally preserved for appeal); *Canton v. Harris*, 489 U.S. 378, 385 (1989). For the first time in nearly a decade of legal proceedings with the Respondent, the Petitioners now raise questions regarding the Fourteenth Amendment due process rights of tenants that were not decided or briefed before the Washington Supreme Court.

Petitioners claim for the first time in their Petition to this Court that tenants are entitled to notice from the City and an opportunity to be heard prior to a landlord's entry into a dwelling unit. The Petitioners have never contended that the City denied the tenants' constitutional right to notice or an opportunity

to be heard, nor have they ever briefed and argued this position.

In their Assignments of Error below, the Petitioners simply broadly asserted that the Ordinance "violates the due process clause of the Fourteenth Amendment. . . ." Brief of Appellants, Assignment of Error #3, *City of Pasco v. Shaw*, 2004 WL 3762311. In their briefing below, the Petitioners argued that the tenants are the only persons who have a privacy right in the apartment units, thus only the tenant can consent to a search of the premises. *Id.* at 19-20. There is no mention of the claim that a tenant has a due process right to notice from the City, much less a hearing in front of the City, prior to a landlord conducting a business license inspection of the unit. Indeed, such an argument flies in the face of the landlord's statutory right of entry and would seemingly lead to a rule of law that deprives a landlord from ever entering an occupied rental unit. Regardless, the Ordinance on its face and as applied, places no obligations for compliance or action on the part of any tenant and merely regulates the issuance of a business license to a landlord. The Ordinance does not implicate the rights of a tenant living in a rental property any more so than a grocery store's business license implicates the rights of a customer shopping in the store.

As an argument that was not briefed and argued below, it comes as a complete surprise to the Respondent now. In accordance with the established judicial policy of fairness to the parties to properly defend

against a claim, this Court should decline to address this new claim. *Singleton,* 428 U.S. at 120 ("We have no idea what evidence, if any, petitioner would, or could, offer in defense of this statute, but this is only because petitioner has had no opportunity to proffer such evidence.").

CONCLUSION

The Petitioners fail to present compelling reasons for this Court to grant review of any issue presented. The lower court's opinion is not in conflict with the decisions of this Court or any Court of Appeals on any matter and wholly fails to demonstrate the existence of any federal question that has not been settled by this Court. Accordingly, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

LAURA DEBACKER MCALOON
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
618 West Riverside Avenue
Suite 300
Spokane, WA 99201-0602
(509) 624-2100

LELAND B. KERR
Counsel of Record
KERR LAW GROUP PS
7025 West Grandridge
Boulevard
Suite A
Kennewick, WA 99336-7724
(509) 735-1542

Counsel for Respondent